



The University of the State of New York

The State Education Department State Review Officer

No. 08-054

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED] School District

Appearances:

Law Office of H. Jeffrey Marcus, attorneys for petitioners, H. Jeffrey Marcus, Esq., of counsel

Harris Beach PLLC, attorneys for respondent, David W. Oakes, Esq., of counsel

DECISION

Petitioners (the parents) appeal from an interim and a final decision of an impartial hearing officer which dismissed their claim for additional services for the 2005-06 school year and denied their request to be reimbursed for their son's tuition costs at the Gow School (Gow) for the 2006-07 and 2007-08 school years. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending tenth grade at Gow (Parent Ex. H at p. 13). Gow has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (Dist. Ex. 4 at p. 1; see 34 C.F.R. § 300.8[c][10];¹ 8 NYCRR 200.1[zz][6]).

¹ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. While some of the relevant events in the instant case took place prior to the effective date of the 2006 amendments, unless otherwise noted, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

The hearing record is sparse with regard to the student's educational history prior to the 2005-06 school year (see Tr. pp. 624-26; Dist. Ex. 31 at p. 8; Parent Ex. E). According to the records before the district's Committee on Special Education (CSE), the student was reportedly diagnosed with dysgraphia in 2003, which impacted his academic achievement, particularly in the area of written expression (Dist. Exs. 17 at p. 6; 31 at p. 7). The student reportedly had difficulty with copying, spelling, accurate computations, left to right tracking, writing lengthy passages, and he required breaks after intense writing (Dist. Ex. 17 at p. 6). The student required individual attention in written expression and the editing process (id.).

In April 2006, while the student was attending eighth grade in the district's middle school, the district conducted a speech-language evaluation of the student at the request of the parents (Dist. Ex. 17 at pp. 44-48). According to the speech-language pathologist, the student remained focused during the testing and did not exhibit any overt signs of inattention during the course of the 90-minute evaluation despite the presence of distracting noises in the surrounding environment (id. at pp. 44, 48). The evaluator administered the Comprehensive Assessment of Spoken Language (CASL), a formal diagnostic tool that provides in-depth evaluation of oral language, knowledge and use of words and grammatical structures, ability to use language for special tasks requiring higher level cognitive functions, and knowledge and use of language communicative contexts (id. at p. 45). Administration of CASL yielded standard scores ranging between 120 to 96 for all core tests and a Core Composite score of 105 (63rd percentile) in the average range (id.). According to the evaluation report, the student demonstrated significant strength in being able to supply synonyms for words (id. at p. 48). The evaluator noted that his understanding of the rules of grammar was age-appropriate (id.). The student exhibited average abilities for interpreting language that was not literal, as well as for using context in order to gain meaning (id.). The student also demonstrated the ability to understand the social rules of language and he knew what to say and do in hypothetical social situations (id.).

The speech-language pathologist also administered to the student the Test of Auditory Processing Skills – 3rd Edition (TAPS-3), an auditory test with no visual stimuli, which resulted in scores that fell in the high average to average range for oral subtests, except for a slightly below average score on the phonological blending subtest, and a below average score on the number memory forward subtest (Dist. Ex. 17 at pp. 46-47). The student's auditory memory skills varied depending on the task (id. at p. 48). According to the evaluator, the student's ability to recall information improved for stimulus items that carried more meaning and he was better able to recall sentences than lists of words or numbers (id.). Although the student's phonological skills fell in the average range, he demonstrated some difficulty synthesizing words given individual phonemic sounds, but was easily able to manipulate phonemes within words in order to segment them (id.). The evaluation report indicates that the student demonstrated strength in tasks that required auditory cohesion skills involving higher order linguistic processing and that he understood implied meanings, made inferences and could come to logical conclusions, given the information in the sentences presented on auditory reasoning tasks (id.). The evaluator noted that the student demonstrated strength in his ability to understand spoken language as presented in paragraphs of increasing length and complexity (id.). The speech-language pathologist opined that the student did not require direct speech-language therapy (id.).

Administration of the Wechsler Individual Achievement Test-II (WIAT-II) in May 2006 yielded average standard scores (SS, percentile rank) for total math (SS 115, 84th percentile), total reading (SS 103, 58th percentile) and total writing (SS 100, 50th percentile) (Dist. Exs. 17 at pp. 23-25, 28; 22). The evaluator indicated that the student continued to show average to above average achievement across all academic areas (Dist. Exs. 17 at pp. 25, 28; 22). The student's math abilities were an area of strength for him, as he computed a great deal of math in his head and used paper and pencil for more complex problems (Dist. Ex. 17 at p. 25). When writing down multi-digit subtraction and multiplication problems, the student did not correctly regroup or carry digits over to correctly solve the problems (id.). With regard to reading, the student demonstrated a relative strength for reading comprehension when presented with short passages to which he could refer while answering questions (id.). The student preferred to read silently and took advantage of having the passage in front of him when answering questions (id.). The student's responses were described as very brief and "to the point" causing the examiner to query him for more information on occasion (id.). The evaluator indicated that the student's written expression skills had improved since previous testing (id. at p. 26). His spelling achievement on the WIAT-II was in the average range (SS 104, 61st percentile) for spelling words in isolation (id. at pp. 25-26). The student demonstrated average ability on the written expression subtest (SS 98, 45th percentile) (id.). The evaluator indicated that the student's performance was affected mostly by incorrect punctuation or capitalization (id. at p. 26). When presented with an essay topic, the student's written response was brief, not in the format as directed, and he did not plan out what he was going to write on paper, but did pause and look around the room for a while before starting and throughout the 15-minute session (id.). The student's sentence structure was described as "excellent" and his sentences were complex, even though he appeared to say as much as he could in as few words as possible (id.). The student used a topic sentence and presented his ideas sequentially, but his transitions were basic and he lacked a concluding sentence (id. at pp. 25-26). He demonstrated a relative strength for developing the theme of his written piece because he had good supports and evidence to back up his argument (id. at p. 26). The student's vocabulary was described as "fairly specific" and offered some variety (id.).

In June and July 2006, an auditory processing assessment of the student was conducted by an audiologist and speech-language pathologist at the request of his parents (Dist. Ex. 18 at p. 1). Test results indicated that the student had normal hearing in both ears with a strong "right ear advantage" that suggested possible auditory closure weakness (id. at p. 7). According to the evaluators, the student needed verbal directions repeated, preferably using the same words rather than rephrasing due to his difficulty with auditory short-term memory skills (id. at p. 7; Dist. Ex. 12 at p. 4). Although the student's auditory processing weaknesses may contribute to some auditory inattentiveness, the evaluators indicated that the student exhibited other behaviors suggestive of attention weakness, such as frequent forgetfulness, lack of attention to detail and careless errors, difficulty with sustained attention and overall organization (Dist. Ex. 18 at p. 7). The evaluation report indicated that student's errors during the evaluation did not appear to be due to an inability to comprehend what was being asked of him in the nature of a true auditory processing disorder (id. at pp. 7-8). Recommendations for the student included specific environmental modifications (e.g., extended test time); compensatory strategies (e.g., learning self-advocacy skills and strengthening memory by use of chunking and mnemonics); and direct

remediation activities (e.g., direction following and previewing/reviewing classroom materials) (id. at pp. 8-9).

Over the course of five months, the CSE met on six occasions to work on development of the student's individualized educational program (IEP) for the 2006-07 school year (Dist. Ex. 14 at pp. 1-3). On August 30, 2006, the CSE recommended that the student receive consultant teacher services in his English and social studies classes and that he attend resource room in a 5:1 student-to-staff ratio for 40 minutes daily (Dist. Ex. 12 at p. 1). The August 2006 CSE also recommended that the student receive related services that included 20 one-hour sessions of assistive technology services during the school year on a 1:1 basis and five 40-minute occupational therapy (OT) consultations during the school year on a 3:1 basis (id.). The following members attended the August 30, 2006 CSE meeting: the parents, their attorney, the district's director of special education, a learning specialist, a psychologist, an additional parent member, a regular education teacher, an assistive technology consultant, and the district's attorney (id. at p. 10). The parents enrolled the student at Gow where he attended school in the ninth grade for the 2006-07 school year (Tr. pp. 157-58; Parent Ex. L).

Prior to meeting for the student's annual review for the 2007-08 school year, the Stanford Achievement Test was administered to the student at Gow, which yielded a total reading score at the 90th percentile, a mathematics score at the 75th percentile, and a language score at the 32nd percentile (Dist. Ex. 8 at p. 6). The student scored at the 24th percentile on the prewriting subtest, at the 23rd percentile on the composing subtest, and at the 48th percentile on the editing subtest (id.). A handwritten notation on the evaluation report form indicated "writing weak" (id.).

Staff from Gow administered the Test of Written Language – 3rd Edition (TOWL-3) to the student in April 2007 (Dist. Ex. 8 at p. 5). The results of the Spontaneous Story subtest showed standard scores (percentile score, grade equivalent) of SS 4 (2nd percentile, 1.7) for contextual conventions (capitalization, punctuation, spelling), SS 13 (84th percentile, 13) for contextual language (sentence structure, complexity of word usage), SS 10 (50th percentile, 8.4) for story construction (story elements, prose), and an overall SS 94 (35th percentile) for spontaneous writing (id.).²

The CSE convened on August 2 and 9, 2007 to develop an IEP for the student for the 2007-08 school year (Dist. Ex. 5 at p. 1). Among the participants at the August 2007 CSE meetings were the parents, the district's director of special education, a speech-language pathologist, a school psychologist, an additional parent member, a regular education teacher and a special education teacher (id.). The district's physician attended the August 2, 2007 meeting, and staff from Gow participated at that meeting by telephone (id.; see Tr. p. 383). On August 9, 2007, the CSE recommended that the student receive consultant teacher services in his English and social studies classes and that he attend resource room in a 5:1 student to staff ratio for 40 minutes daily (Dist. Ex. 4 at p. 1). The August 2007 CSE also recommended that the student

² The evaluation report also included results of the April 21, 2006 administration of the TOWL-3 (Dist. Ex. 8 at p. 5). Comparison of the two administrations of the TOWL-3 shows that student's scores in contextual language and spontaneous writing improved (id.).

receive related services that include 20 one-hour sessions of assistive technology services during the school year on a 1:1 basis and five 40-minute OT consultations during the school year on a 3:1 basis (id.). The parents rejected the district's recommendations and continued the student's enrollment at Gow for the tenth grade during the 2007-08 school year (Dist. Exs. 9; 11; Parent Ex. L).

In a due process complaint notice dated December 6, 2007, the parents alleged that during the 2005-06 school year, the student did not make meaningful progress toward his IEP goals and was unable to plan, write and complete his assignments on time (Dist. Ex. 1 at p. 2). Among other things, the parents asserted that they had bought a computer for the student and the school could not load speech-to-text and text-to-speech software on it (id.). According to the parents, they placed the student in Gow for the 2006-07 school year in response to the alleged shortcomings of the student's 2005-06 IEP (id.).

With respect to the recommended IEP for 2006-07, the parents' due process complaint notice indicated that the student was not provided with enough supports for his major writing deficiencies and that no writing program was offered to the student (Dist. Ex. 1 at p. 1). The parents alleged that the student was placed in "mostly regular education classes" without support, and that the program recommended by the district offered "little individualized instruction" (id. at p. 2). The parents also alleged that the two "co-taught" classes were dominated by "whole group instruction," and that the resource room was limited to 40 minutes per day and was focused on the student's self-advocacy and organization skills instead of his writing issues (id.).

With regard to the student's 2007-08 IEP, the parents alleged that the IEP provided essentially the same program as the 2006-07 IEP offered by the district and was inappropriate for the same reasons (Dist. Ex. 1 at p. 2). The parents also claimed that the transition plan in the 2007-08 IEP did not contain an adequate statement of needs, measurable post secondary goals, or a statement of responsibilities of the district and other agencies for provision of services promoting school to post-school activities (id. at pp. 2-3). The parents alleged that Gow was appropriate for the student and that the equities favored the parents (id. at pp. 3-4). As relief, the parents sought additional services for the 2005-06 school year, and among other things, reimbursement for the student's tuition at Gow for the 2006-07 and 2007-08 school years (id. at p. 4).

In February 2008, the district argued before the impartial hearing officer that the parents' additional services claim for the 2005-06 school year was barred by the two year statute of limitations (Parent Ex. M at pp. 32-34).³ In an interim decision date February 12, 2008, the impartial hearing officer determined that the parents' 2005-06 claims were barred by the statute of limitations (id. at pp. 74-76).

The impartial hearing convened on February 8, 2008 and concluded on March 4, 2008 after four days of testimony. In a decision dated May 2, 2008, the impartial hearing officer noted the student's cognitive ability, strengths in reading comprehension, vocabulary, arithmetic

³ In an e-mail from the parents' attorney to the district's attorney dated January 23, 2008, the parents indicated that they were seeking 400 hours of tutoring at "market rate" due to the district's failure to offer an appropriate program during the 2005-06 school year (Parent Ex. M at p. 19).

operations and reasoning, as well as his weaknesses in written expression handwriting and organization (IHO Decision at pp. 15-16). The impartial hearing officer reviewed the student's grades for the 2005-06 school year and noted that achievement of passing marks and advancing from grade to grade in the general education classroom was an important factor regarding satisfactory progress (id. at p. 16). The impartial hearing officer noted similarities between the student's final eighth grade report card from the district and his final ninth grade report card during 2006-07 from Gow, as well as similarities in the comments of teachers from both schools (id. at pp. 16-17). The impartial hearing officer noted indications in reports that the student did not use technology supports consistently and that he did not wish to appear different from other students in his class (id. at p. 17). Therefore, the impartial hearing officer concluded that the student did not fully cooperate with the provisions in his IEP (id.). The impartial hearing officer reviewed the provisions of the 2006-07 IEP and concluded that the assessment of the student's needs, goals and objectives, and recommended special education and related services were appropriate for the student (id. at pp. 18-20). Among other things, the impartial hearing officer indicated that the goals and objectives in the 2007-08 IEP were appropriate and that his individual special education needs would have been met (id. at pp. 27-28). The impartial hearing officer denied the parents' request for tuition at Gow for the 2006-07 and 2007-08 school years (id. at pp. 20, 28).

The parents appeal, contending that the impartial hearing officer failed to explain why he relied on the testimony of the district's witnesses instead of the parents' witnesses, failed to consider the hearing record or reference it in his decision, and did not indicate in his decision how information in the hearing record supported his conclusion that the 2006-07 IEP was appropriate. The parents argue that the impartial hearing officer improperly relied on the student's grades, and erred in stating that the district was going to provide the student with consultant teacher services because the student was to be placed in an integrated co-teaching class.⁴ While the parents agree with the impartial hearing officer's conclusion that the student "did not make progress in the areas of written expression and study skill[s]," the parents contend that the impartial hearing officer improperly placed responsibility for this lack of progress on the student. The parents also argue that the impartial hearing officer failed to consider the hearing record and the student's lack of progress, failed to find that the "radically reduced set of goals" on the student's 2007-08 IEP was a denial of a free appropriate public education (FAPE), and did not determine whether the student's IEP for the 2007-08 school year was appropriate.⁵ The parents also contend that the impartial hearing officer failed to determine when the parents' claim for additional services for the 2005-06 school year accrued, and improperly determined that the statute of limitations precluded their claim for the 2005-06 school year.

According to the parents, the district failed to ascertain the reasons for the student's inconsistent use of assistive technology and instructional strategies or provide appropriate assistive technology; and failed to address the student's dysgraphia, reading difficulties, written expression problems, organizational difficulties, need for structure, self-advocacy problems, and

⁴ The parents allege that the district was misrepresenting that the student would receive consultant teacher services.

⁵ The parents allege that the impartial hearing officer erred in ruling on reimbursement for speech services because there was no such claim at the impartial hearing.

need for intensive individualized instruction. The parents assert that the district failed to provide an appropriate transition plan for the student. The parents also assert that the 2006-07 IEP failed to provide the student with sufficient structure and support to complete his homework and the CSE failed to recommend a placement in the least restrictive environment (LRE). The parents assert that the 2007-08 IEP and recommended placement are deficient for the same reasons as the 2006-07 IEP, and that both IEPs failed to distinguish between providing direct and indirect consultant teacher services. In essence, the parents allege that the district failed to satisfy its burden to show that its recommendations for the student for the 2006-07 and 2007-08 school years were appropriate.

With respect to Gow, the parents argue that its "Constructive Language" class addressed the student's deficits in dysgraphia and expressive writing, and that its "Reconstructive Language" class addressed the student's mild dyslexia. The parents also contend that Gow addressed the student's inconsistent homework completion and submission of work needs, and that Gow made use of technology. The parents assert that Gow was the LRE because the student needed an extended day program. According to the parents, the impartial hearing officer erred by failing to recognize that the student had made substantial progress at Gow with respect to written expression, handwriting, reading, ability to complete his work, and reduction in missed and late assignments. The parents also allege that they were cooperative and that the equities weigh in favor of the parents for both the 2006-07 and 2007-08 school years.

As relief, the parents seek an award of tuition reimbursement and related expenses for Gow for the 2006-07 and 2007-08 school years and that their claims for the 2005-06 school year be remanded to a new impartial hearing officer for additional proceedings.

In its answer, the district admits with clarification many of the background facts alleged by the parents; however, the district denies the parents' allegations asserting that the district had violated the law, that the IEPs were deficient or that the student was not offered a FAPE for the 2006-07 and 2007-08 school years. The district also denies that the decision of the impartial hearing officer contained deficiencies and contends that impartial hearing officer correctly dismissed the parents' claims for the 2005-06, 2006-07 and 2007-08 school years.

A central purpose of the IDEA (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).⁶ A student's educational program must also be provided in the LRE (20 U.S.C.

⁶ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

§ 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program that met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F. 3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 115).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need

only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; see also A.D. and H.D. v. New York City Dep't of Educ., 06 Civ. 8306 [S.D.N.Y. April 21, 2008]).

A student who remains eligible to attend school and has been denied appropriate services may be awarded "additional services," if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Application of the Bd. of Educ., Appeal No. 08-017; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 02-047; see also Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). In general, the award of additional educational services for a student who is still eligible for instruction requires a finding that the student has been denied a FAPE (Application of a Student with a Disability, Appeal No. 08-035; Application of the Bd. of Educ., Appeal No. 04-085; Application of the Bd. of Educ., Appeal No. 02-047).

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). In 2007, the New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning to the parents' assertions regarding the statute of limitations and their additional services claim for the 2005-06 school year, the IDEA was amended in 2004 with an effective date of July 1, 2005. The IDEA 2004 amendments added an explicit limitations period for filing a due process hearing request and also added explicit accrual language. IDEA 2004 requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][i]). Absent clear congressional intent, a newly enacted federal statute of limitations does not operate retroactively (see Landgraf v. USI Film Products, 511 U.S. 244, 280 [1994]; In re Enterprise Mortgage Acceptance Co., 391 F.3d 401 [2d Cir. 2005] [holding that the limitations period in the Sarbanes-Oxley Act of 2002 did not have the effect of reviving stale claims]; Application of a Child with a Disability, Appeal No. 06-083). Prior to the IDEA 2004 amendments, the IDEA did not prescribe a time period for filing a request for an administrative due process hearing and a one-

year limitations period was applied in New York (M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; Application of the Bd. of Educ., Appeal No. 02-119). A claim accrues when the complaining party knew or should have known of the injury involved, i.e., the inappropriate education (Southington, 334 F.3d at 221).

Here, the first step in establishing whether the parents' 2005-06 claims in their due process complaint notice were timely is to determine when the parents' claim accrued. An e-mail from the student's mother to the district's director of special education dated November 2, 2005 indicates that the parents were dissatisfied with the district's implementation of the student's program and she requested that the student be provided with a "notetaker" because the district failed to obtain an assistive technology evaluation report (Parent Ex. I at pp. 6-7). The student's mother indicated that approximately 20 to 30 hours of assistive technology services had been discussed at a "team meeting" in September 2005 to address the student's dysgraphia (id. at p. 6). Although the district added 20 hours of assistive technology training and support services to the student's IEP in December 2005 (compare Dist Ex. 34 at pp. 1-2, with Dist. Ex. 28 at pp. 1-2), the hearing record indicates that the parents were dissatisfied because the student was not "keeping up," was "missing important information . . . for tests" and that valuable time was being lost (Parent Ex. I at p. 6). Although the impartial hearing officer's interim decision did not clearly indicate when the parents' 2005-06 school year additional services claim accrued (Parent Ex. M at p. 5), I find that the parents' 2005-06 additional services claim accrued no later than November 2, 2005. Accordingly, I concur with the conclusion reached by the impartial hearing officer that the parents' 2005-06 additional services claim is barred by the two year statute of limitations because they asserted their claim more than two years after it accrued (Tr. pp. 661-62; Dist. Ex. 1 at pp. 2, 4; Parent Exs. I at pp. 6-7; M at p. 5; see 20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][i]; Southington, 334 F.3d at 221).

Turning next to the parties' contentions regarding the appropriateness of the student's IEPs and the district's recommended special education program and related services for the 2006-07 and 2007-08 school years, for the reasons described below, I concur with the impartial hearing officer's conclusions that the district's recommendations were appropriate for the student (IHO Decision at pp. 20, 27-28).

After meeting several times between April 2006 and August 2006, the CSE reconvened on August 30, 2006 to finalize the student's IEP for the 2006-07 school year (Tr. p. 701; Dist. Exs. 12 at p. 1; 14 at p. 1). With regard to the parents' assertions that the district failed to address the student's dysgraphia, reading difficulties, written expression problems, organizational difficulties, need for structure, self-advocacy problems, and need for intensive individualized instruction; I find that the student's 2006-07 IEP appropriately reflected the evaluations, reports and discussion of the CSE concerning the student (Dist. Ex. 12 at pp. 4-9, 11).

The student's present levels of performance specific to his social, cognitive, speech-language and central auditory processing, reading, math, written expression, and note taking skills, as well as his preferred learning modalities, were detailed and consistent with the results of formal evaluations conducted between 2004 and 2006 (Dist. Ex. 12 at pp. 7-8, 11). The 2006-07 IEP indicated that cognitively the student functioned in the average to high average range of

intellectual ability, despite questions regarding his effort and attitude toward testing, as well as his subtle shifts in attention that required redirection (*id.* at p. 4). The 2006-07 IEP reflected the student's normal hearing acuity, his right ear advantage and some characteristics of auditory processing weaknesses, and difficulty with auditory short-term memory skills that contributed to his need for repetition of verbal directions (*id.* at pp. 4-5). With regard to reading, results of the WIAT-II indicated that the student read at grade level and that his reading comprehension was a relative strength (twelfth grade level) in the high average range, while word reading and pseudoword decoding were in the average range (*id.* at p. 4). The IEP indicated that in math, the student was able to grasp concepts well and apply them to daily assignments and assessments (*id.*). The student was noted to make careless errors in computation and was capable of mental computation, but required strategies to write down the steps of math processes he used (*id.*). The IEP also indicated that the student had been moved from honors math to advanced math, where more time was allocated to review course material and to prepare for the final exam (*id.*). The 2006-07 IEP also reflected that the student's dysgraphia affected all areas of academic achievement, especially his written expression, as noted by his difficulties with copying, spelling, accurate computations, and left to right tracking (*id.* at pp. 4-5). Explanation was included on the 2006-07 IEP regarding the student's difficulty in writing lengthy passages and his need for breaks after writing tasks that were intensive for him (*id.* at p. 5).

The 2007-08 IEP included the results of the evaluations noted above and also reflected the updated results of the Stanford Achievement Test conducted by Gow in April 2007 in the areas of reading, math, and written expression, as well as classroom observation of the student at Gow during the ninth grade (Dist. Ex. 4 at pp. 3-5).

The student's 2006-07 and 2007-08 IEPs reflected the student's needs in a detailed manner that was consistent with progress and teacher reports, and included information about private testing and requests made by the student's parents (Dist. Exs. 4 at pp. 3-6; 12 at pp. 4-7). The IEPs indicated that the student required individual attention in written expression and the editing process, using a hands-on approach with pre-writing strategies and direct monitoring (Dist. Exs. 4 at p. 4; 12 at p. 5). The IEPs reflected that in the classroom, the student displayed difficulty self-advocating when he did not understand an activity and did not seek clarification from peers or adults (Dist. Ex. 12 at pp. 5-6; *see* Dist. Ex 4 at p. 5). Thirty-eight needs were listed on the student's 2006-07 IEP and 39 were listed on his 2007-08 IEP (Dist. Exs. 4 at pp. 5-6; 12 at pp. 6-7). For example, on the student's 2006-07 IEP, in the areas of written expression, writing processing and dysgraphia, the CSE indicated that the student needed: (1) a copy of teacher or peer notes; (2) assistance proofreading his written work in math or classes with written components; (3) instruction on strategies to expand on his written expression; (4) a variety of cues, prompts, webs or graphic organizers to assist with pre-writing step, including classroom rubrics; (5) assistance with proofreading and editing writing assignments; (6) direct support for extended writing assignments, monitored by "RR" and classroom teachers;⁷ (7) breaks during extended writing activities, even if word processing; (8) engineering paper for math and science; (9) adult monitoring of assignments to make sure they are recorded for accuracy and completion; (10) adult monitoring of the submission of his completed work; (11) abbreviations taught for common words such as "w/out" and "b/4;" (12) specification of when assignments will be graded for spelling, or use of upper/lower case letters; (13) practice copying answers from test

⁷ From the context of the hearing record, it appears that "RR" refers to "resource room" (Dist. Ex. 12 at p. 6).

booklets to scantron sheets; and (14) alternatives to pen/paper writing assignments (Dist. Ex. 12 at p. 6).

The student's 2006-07 and 2007-08 IEPs also described his educational needs to be addressed with assistive technology including: (1) computerized templates provided for written assignments, such as labs or essays; (2) the student to be taught how to create or access templates for frequently used writing assignments; and (3) encouragement of the student to use recommended software for math and science work (Dist. Exs. 4 at p. 5; 12 at p. 6).

The August 2006 and August 2007 CSEs identified that the student's auditory needs were: (1) oral directions given in close proximity and repeated, if necessary, using the same words; (2) frequent teacher checks to ensure that the student is on-task and following directions correctly and comprehending; (3) adequate wait time to process information; (4) teach and reinforce strategies for active listening (whole body) and auditory closure (e.g., such as tasks with missing words, syllables, phonemes); (5) preferential seating to support "right ear" advantage; (6) monitoring/cues for processing information when listening conditions may be difficult (i.e., new vocabulary, competing sounds, unclear or quickly paced speech); (7) whole to part strategies; (8) pre-teach new information and vocabulary; (9) strategies for extracting key information from auditory presentations; and (10) instruction and reinforcement in memory strategies as needed (e.g., verbal rehearsal, tag words such as a first, last, chunking, mnemonics, visual imagery, and pairing verbal instruction with music or notation) (Dist. Exs. 4 at pp. 5-6; 12 at pp. 6-7).

The 2006-07 and 2007-08 IEPs indicated that the student's organization and planning needs were: (1) strategies for organization of his work, assistance with prioritizing and completing assignments, including homework; (2) benefits from packets of notes and homework assignments, so he can see where he is heading and for organizational support; (3) strategies to write down the relevant steps of math processes; and (4) strategies to plan for long-term assignments, tests and exams (Dist. Exs. 4 at p. 6; 12 at p. 7).

The August 2006 and August 2007 CSEs indicated that the student's self-advocacy needs were: (1) encouragement to seek teacher assistance when he does not understand directions or information given; (2) encouragement to participate in class discussions and activities to demonstrate knowledge; (3) role-playing of interactions between teacher and [the student] before he needs to self-advocate; and (4) development and reinforcement of advocacy skills (Dist. Exs. 4 at p. 6; 12 at p. 7). Both the 2006-07 and the 2007-08 IEPs identified the student's hands-on needs, as well as his other academic, social, physical and management needs (Dist. Exs. 4 at pp. 6-8; 12 at pp. 7-10). I have carefully reviewed the evidence presented in the hearing record and I find that the present levels of performance and needs identified in the student's 2006-07 and 2007-08 IEPs were reflective of the evaluations of the student, and consequently I find that the parents' claims that the IEPs were deficient in this regard are without merit.

I am also not persuaded that the evidence in the hearing record shows that the district failed to provide appropriate assistive technology or ascertain why the student did not make use of his assistive technology. To the contrary, the assistive technology consultant testified that the student told her, "I am not sure if I want to look that different. I don't want to sit in the class with

a computer in front of me when everyone else is sitting with a piece of paper and pencil" (Tr. p. 107). In addition, the hearing record reflects that the student was provided with an assistive technology assessment, training and support during the 2005-06 school year, and that he received software for math and science (Tr. p. 109; Dist. Ex. 33). The 2006-07 IEP indicated that the student did not need word prediction writing supports because his keyboarding skills were too advanced, and both the 2006-07 and 2007-08 IEPs reflected that the student would have access to a word processor and that a tablet PC and case would be provided for the student to use throughout the school day and to take home (Dist. Exs. 4 at p. 2; 12 at pp. 2, 9). Both IEPs indicated that assistive technology training and support to address the student's writing difficulties in content subjects would be available (id.). Additional assistive technology supports included provision of speech-to-text software, text-to-speech software, math support software, and templates for labs and writing assignments as appropriate to content base (Dist. Exs. 4 at p. 2; 12 at p. 2). The CSE also made a recommendation to explore forms based tests (id.). In view of the evidence above, I find that the parents' assistive technology claims for the 2006-07 and 2007-08 school years are without merit.

With regard to the parents' claim that the goals and objectives in the student's 2006-07 and 2007-08 IEPs were deficient, the 2006-07 IEP contained a total of ten annual goals and 40 short-term objectives (Dist. Ex. 12 at pp. 12-17). All annual goals and their associated objectives or benchmarks were descriptive, measurable, and included a schedule of anticipated progress (id.). The IEP also indicated that periodic reports of the student's progress toward meeting the student's IEP annual goals would occur four times during the school year (id. at p. 11).

The annual goals and objectives addressed the student's identified needs and targeted study skills strategies for the student to proofread homework or classroom assignments, use preparatory strategies to study for tests (graphic organizers, hand-held tape recorder, "cloze" style⁸ study guide or review notes, outline text generated note cards, etc.), arrive to class with needed materials (agenda, homework, utensil, binder, word processor, etc.), utilize a planning process to outline requirements and due dates for longer term assignments (e.g., templates on a word processor, timeline, etc.), and use technology (e.g., computer, software, templates) to complete school assignments (Dist. Ex. 12 at pp. 12-14; see Tr. pp. 32-34, 275). Additional goals addressed using learned strategies to complete written assignments of one paragraph or more (strategies included: templates, webs, rubrics, hands-on pre-writing tasks, "6+1" writing traits, and software, etc.),⁹ and use of grammar check tools on the student's word processor to correct punctuation and capitalization errors, as well as speech and language goals that required the student to use memory skills to assist in content and retention (strategies included verbal rehearsal, tag words, chunking, mnemonics, and visual imagery, etc.) (Dist. Ex. 12 at pp. 14-15; see Tr. p. 34). Social/emotional/behavioral goals and objectives addressed the student's need to seek assistance from a teacher prior to the due date of an upcoming test or assignment (lab or essay) with and without verbal and non-verbal prompts through role play of a given scenario

⁸ Testimony by the student's eighth grade regular education English teacher during 2005-06 indicated that "clozed notes" are notes containing blanks spaces so the student would not have to write too much when taking notes (Tr. p. 260).

⁹ Testimony by the district director of special education indicated that the "six plus one" writing traits is direct instruction in the components of writing (Tr. p. 754; see Tr. p. 34).

related to self-advocacy with a peer or an adult while in school, independently asking the resource room teacher to help the student expand on his ideas within a writing assignment, and by scheduling an appointment to meet with academic subject teachers and the review of the rough draft of any essay or lab (Dist. Ex. 12 at pp. 16-17). Another annual goal addressed the student's need to maintain attention to task during lessons and activities in the classroom by participating in class discussions with no more than one verbal or non-verbal prompt per class period (id. at p. 17).

In a similar fashion to the 2006-07 IEP, I also note that the August 9, 2007 IEP for 2007-08 included appropriate annual goals that were detailed and measurable (Dist. Ex. 4 at pp. 10-11). The annual goals in the student's 2007-08 IEP were consistent with the reports from the student's teachers at Gow that were discussed at the August 9, 2007 CSE meeting (id. at p. 5; Parent Ex. H), and addressed the student's identified needs to complete both short-term and long-term assignments, to generate a study plan one to two weeks prior to all assignments, to proofread and edit written work, to use a variety of prewriting strategies, and to seek assistance from others when clarification was needed (Dist. Ex. 4 at pp. 5, 10-11). All of the annual goals that targeted study skills and writing skills included specified strategies, supports, and/or assistive technology for the student to use in his effort to make progress in each goal (id. at pp. 10-11). The evidence in the hearing record persuades me that the goals and objectives recommended by the August 2006 and August 2007 CSEs were appropriate to address the student's needs.

I am also persuaded that the special education and related services recommended in the 2006-07 and 2007-08 IEPs were appropriate. The 2006-07 and 2007-08 IEPs noted that due to the student's dysgraphia, OT consultation would be provided to monitor his fine motor skills and provide modification strategies as necessary in all academic classes (Dist. Exs. 4 at pp. 1-2; 12 at p. 1). Initial indirect OT consultation would be conducted within the first two weeks of school (Dist. Exs. 4 at p. 2; 12 at p. 2). Daily resource room services would focus on organization and developing self-advocacy skills to help the student manage time and work load, and would provide assistance to the student regarding his written expression difficulties (id.). The CSE recommended co-taught classes with a student-to-teacher ratio of 8:1 for both English and social studies for 2006-07 and 2007-08 (Dist. Exs. 4 at p. 1; 12 at p. 1; see Tr. pp. 442-43). The 2007-08 IEP indicated that the student's participation in these classes would support the student in addressing his organizational and writing strategies (Dist. Ex. 4 at p. 2).

The 2006-07 and 2007-08 IEPs indicated that the student would have access to a word processor, and that a tablet PC and case would be provided for the student to use throughout the school day and to take home (Tr. pp. 347-48; Dist. Exs. 4 at p. 2; 12 at p. 2). A notation included on the IEPs indicated that assistive technology training and support to address the student's writing difficulties in content subjects would be available (id.). Additional technology supports indicated in both the 2006-07 and 2007-08 IEPs included provision of speech-to-text software, text-to-speech software, math support software, templates for labs and writing assignments as appropriate to content base and to explore forms based tests (id.).

Regarding support for school personnel on behalf of the student, the 2006-07 and 2007-08 IEPs indicated that the special education teacher, occupational therapist and speech therapist

would meet with regular education teachers within the first two weeks of school so that strategies to improve written expression, memory skills and auditory processing would be used in classrooms as well as the resource room setting (Dist. Exs. 4 at p. 2; 12 at p. 2). Furthermore, a copy of the student's IEPs would have been provided to each regular education teacher, special education teacher, related service provider, and any other appropriate provider, informing them of their responsibility relating to confidentiality and implementation of the IEPs, and follow-up throughout the year (id.). Additionally, an assistive technology coordinator would work across all settings with regular education teachers to train and support the current technology available to the student, as well as to ensure its integration into his academic day (id.).

Both the 2006-07 and 2007-08 IEPs recommended testing accommodations that also addressed the student's needs (Dist. Exs. 4 at p. 3; 12 at pp. 2-3). The August 2006 and August 2007 CSEs recommended increased spacing between test items, use of engineering paper on all math tasks, test administered in setting with minimal distractions, answers recorded in test booklet because of the student's left to right copying difficulty, use of a word processor, allowing the student to use the spell and grammar check feature, and extended time (2.0) (id.).

Turning next to the parents' contention that the district failed to provide an appropriate transition plan, the 2006-07 IEP included a detailed coordinated set of transition activities to facilitate the student's movement from school to post-school activities (Dist. Ex. 12 at p. 10). The transition plan addressed the student's instructional activities, related services, development of employment/other post-school adult living objectives, community experience, and acquisition of daily living skills by defining activities in which the student would be engaged and the school district/agency responsible for the activity for the 2006-07 school year (id.). Activities included the student's participation in a regular course of study with the recommended special education services that would lead to a high school diploma, support through indirect OT consultation and direct assistive technology services, participation in all subject areas particularly business in order to prepare for possible career options, completion of an online survey that would assess his areas of interest, exploration of options to job shadow in a field of interest such as business, the student would create a schedule to address his time management skills, and he would role-play potential interactions with teachers so that he would feel more comfortable approaching them for extra help for clarification (id.).

Furthermore the student's 2007-08 IEP also included a transition plan similar to the one developed by the CSE for 2006-07. However, I note that the 2007-08 IEP included a timely update regarding the student's community experience that indicated that the student had participated in a wide variety of community service opportunities while he attended Gow (Dist. Ex. 4 at p. 9). The 2007-08 IEP also noted that specific to a functional vocational assessment, the student would participate in the tenth grade Health Class Career Inventory Assessment (id.). Therefore, I find that the parents' contention regarding transition planning lacks merit.

In view of the forgoing, I find that the impartial hearing officer reached the correct conclusions in dismissing the parents' 2005-06 claim for additional services; and I find, based on the evidence in the hearing record, that the 2006-07 and 2007-08 IEPs, at the time they were formulated, were reasonably calculated to provide the student with educational benefits, and the district offered the student an appropriate educational placement. Accordingly, the evidence in

the hearing record does not persuade me that the district failed to offer the student a FAPE (M.D. and T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008]). Generally, having determined that the challenged IEPs offered the student a FAPE for the 2006-07 and 2007-08 school year, I need not reach the issue of whether the parents' unilateral placement of their son at Gow was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Child with a Disability, Appeal No.07-017; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parents' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 July 23, 2008

PAUL F. KELLY
STATE REVIEW OFFICER